UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 15

VALMET, INC.	)	
	)	
and	)	CASE NO. 15-CA-206655
	)	CASE NO. 15-RC-204708
UNITED STEEL PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	

RESPONDENT'S POST-HEARING BRIEF

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I. STATEMENT OF THE CASE

This case was tried before Administrative Law Judge Arthur J. Amchan (the ALJ) in Columbus, Mississippi on February 26 and 27, 2018. It involves allegations that Valmet, Inc. (Respondent or Valmet or the Company) violated Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (the Act) in September 2017[1] in response to an organizing attempt at its Columbus plant (the plant) by the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC (the Union).

The Union filed a petition on August 21 (Ex. GC 1(a)) and an election was held on September 14 and 15. (GC Ex. 2, ¶ 8; Tr. 68.) The majority of employees rejected union representation, with forty-three (43) employees voting against and forty-two (42) for union representation. (GC Ex. 4.)

The Union filed the original objections to the election on September 20 (GC Ex. 1(d)), an unfair labor practice charge consisting of the identical allegations on September 21 (GC Ex. 1(e)), an amended charge on October 18 (GC Ex. 1(i)), a second amended charge on November 3 (GC Ex. 1(k)), and a third amended charge on November 30 (GC Ex. 1(m)). The resulting Complaint alleges that Valmet violated Sections 8(a)(1) and 8(a)(3) in six distinct ways during September. (GC Ex. 1(o).)

First, the Complaint alleges that in September Valmet promised employees a benefit in the form of a cash raffle prize if the employees participated in the anti-union campaign and that they held a cash raffle prize for the employees on September 13. (GC Ex. 1(o) ¶¶ 7, 13(a).)

[1] All dates referenced herein are in 2017, unless otherwise indicated.

Second, the Complaint alleges that sometime in early September, Valmet, through a contractor Tiffany Wallace, unlawfully threatened employees with job loss and loss of benefits if they selected the union as their bargaining representative. (GC Ex. 1(o), ¶¶ 8(a), (b).)

Third, the Complaint alleges that on or about September 7, General Manager Brian Hammerbacher threatened employees with loss of benefits and frozen wages and loss of raises if they selected the union as their bargaining representative. (GC Ex. 1(o), ¶¶ 9(a), (b).)

Fourth, the Complaint alleges that shipping and receiving supervisor Christopher Cliett threatened employees with frozen wages and loss of wages if they selected the union as their bargaining representative. (GC Ex. 1(o), ¶ 10.)

Fifth, the Complaint alleges that on September 13 Vice President of Human Resources, Doug Sheaffer threatened employees with frozen wages and loss of raises, solicited employee complaints and grievances promising increased benefits and improved terms and conditions of employment if the employees rejected the union, and informed employees it would be futile for them to select the union as their bargaining representative. (GC Ex. 1(o), ¶¶ 11(a), (b).)

Sixth, the Complaint alleges that, on or about September 14, Production Supervisor Larry Richardson threatened employees with termination and unspecified reprisals if they selected the union as their bargaining representative. (GC Ex. 1(o), ¶¶ 12(a), (b).)

As set forth below, each of these allegations is without merit and the Complaint should be dismissed in its entirety and the results of the election certified.

II. BACKGROUND AND SUMMARY

The election at issue in this case was the second election held at the Columbus facility in a less than two-year period. In 2017, a majority of the employees, as they had in 2015, rejected representation by the Union. In the prior campaign, the employees had complained about leadership at the plant and the Company made a change to accommodate their complaints. Valmet

heard similar complaints, prior to the filing of the election Petition in 2017. However, the Company refused to give in to the employee's union saber-rattling and decided, instead, to provide employees with information and facts about the collective bargaining process, the successes that had been enjoyed at the facility over the years and to draw comparisons with other Valmet locations that do and do not have union contracts. Specific comparisons were offered between wages and benefits currently provided to Columbus employees in comparison to the USW represented employees in Valmet's Neenah, Wisconsin facility.

Following the second rejection of union representation in a two year period, the instant objections and ULP's were filed. After four (4) full weeks of regular pre-election communications by the Company, the Union was only able to come up with six (6) discrete claims against Valmet managers and others. The evidence presented at the Hearing included surreptitious recordings of two captive audience meetings, which included only limited and highly subjective alleged threats. Two (2) allegations involve statements related to what can happen in negotiations with wage increases after a union wins an election, but before a collective bargaining agreement is reached. That issue was affirmatively raised by employees and already answered by Union before the issue was ever raised by the Company. The issue of what might happen to pay increases and wage rates during the bargaining period was never part of the Company's communications campaign. Indeed, some employees obviously asked the questions in an attempt to "set up" the Company and for the express purpose of challenging the results of the election. As they testified, Valmet's managers were not skilled regarding the correct legal answers to these questions, so they reverted to what they did know – that the *status quo* must remain in place.

The additional allegations involve alleged threats by a non-employee contractor with no supervisory or agency status and an alleged complaint that an employee was threatened when a manager told him "remember that I hired you" in the context of discussing an operational issue.

These spurious allegations must also be considered in light of the total amount of material and information provided to employees during the campaign. The Union has only objected to these few, arguably innocuous statements in the context of nineteen (19) total meetings and over twenty (20) written communications to the employees over a four (4) week period. Even with affirmative attempts to "set-up" management to generate allegations of unlawful statements, the lack of any clear cut violations and the small number of allegations belies the contention that these employees were threatened or coerced in violation of the Act.

Accordingly, for all the reasons set forth below, the Complaint should be dismissed, the objections overruled and the election results certified.

III. LEGAL ARGUMENT

A. General Counsel Bears The Burden To Prove Each Element Of Its Complaint Allegations By A Preponderance Of The Relevant Evidence Presented.

In an unfair labor practices proceeding, the Board bears the burden of proof and persuasion of showing that an employer has engaged in an unfair labor practice. *See Unifirst Corp.*, 346 NLRB 591, 593 (2006). If the Board does not meet this burden by a preponderance of the evidence, there can be no finding that an unfair labor practice has occurred. *See id.*

General Counsel's burden of proof should also be considered in light of Respondent's right to communicate with employees regarding the realities of life with a union during a representation proceeding. Section 8(c) of the Act provides that "[t]he expressing of *any views*, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such

expression contains no threat of reprisal or force or promise of benefit." Indeed, "an employer may criticize, disparage, or denigrate a union without running afoul of Section 8(a)(1), provided that its expression of opinion does not threaten employees or otherwise interfere with the Section 7 rights of the employees." *Children's Center for Behavioral Development,* 347 NLRB 35 (2006).

As to the Union's request to set aside the election results on the basis of alleged objectionable conduct, the Board considers "not merely whether a party has engaged in conduct that interferes with, restrains, or coerces employees in exercise of their Section 7 rights," but "whether the conduct in question was likely to effect the election outcome; when circumstances are such that [the judge] cannot reach this conclusion, [the judge does] not set aside the election." *Machinists (Burkart Foam),* 286 NLRB 417, 419 (1987) (*citing Clark Equip. Co.*, 278 NLRB 498 (1986)). Here, General Counsel failed to prove by a preponderance of the evidence that Valmet engaged in conduct sufficient to overturn the results of the election. The credible evidence reflects that the Company lawfully communicated with employees about the realities of unionization during pre-election meetings and engaged in no unlawful acts.

B. General Counsel Failed To Prove That Respondent Unlawfully Promised Any Benefit To Employees – In The Form Of A "Cash Raffle Prize" (Responsive to Complaint Paragraphs 7 and 13(a) and (b)).

1. General Counsel's Attempted Mischaracterization of Respondent's Quiz Contest as a "Cash Raffle Prize" is Unsupported by Record Testimony.

The essential Complaint claim on this issue is that the contest announcement and quiz constitute a "promised … benefit, in the form of a cash raffle prize" to encourage "employees [to] participate[] in its anti-union campaign". (GC Ex. 1(o), ¶ 7.) In an attempt to wedge the facts of the instant situation into the narrow confines of a single case, General Counsel incorrectly labeled the Company's contest as a "raffle." Such an unwarranted description of the Company's actual documents, is specifically rebutted by the precise wording of the first announcement. None of the

documents related to the contest invited employees to participate in a "raffle" and the word "raffle" was never used by Respondent in reference to the contest event. (GC Ex. 2, Jt. Exs. 1-4.) The word "raffle" certainly does not accurately describe the undisputed facts concerning the contest. A "raffle" is defined as "a lottery in which a prize is won by one of the numerous persons buying chances."[2] That is not what occurred here. Here, employees were invited to pay attention to provided Fact Sheets if any of them wanted to have a "chance to test their knowledge" on a later quiz based on those sheets. (GC Ex. 2, Jt. Exs. 1-2.)

The essential facts regarding this issue are not in dispute. In fact, the parties agreed to a Joint Stipulation of Facts (GC Ex. 1, Jt. Exs. 1-4) on the contest details. As stated in the initial contest announcement, Respondent was concerned that pro-union supporters would try to prevent its employees from reviewing Fact Sheets on issues relevant to election choices. (G.C. Ex. 2; J. Exs. 1-4.) To encourage voters to educate themselves on relevant facts before the election, Respondent announced the contest terms on August 30. That contest announcement was posted for all employees to see. (J. Ex. 1.)

On September 10, another posting reminded employees of the upcoming contest. In that, they were informed that quiz forms would be available at 5:30 a.m. on September 12. It is clear from both announcements that the event was a quiz contest and not a "raffle." (J. Ex. 2.) Starting at 5:30 a.m., on September 12, employees on each shift were told they could ask their supervisors or managers for quiz forms. Quiz forms were distributed among supervisors and the forms, themselves, clearly state that taking a quiz to complete was a "completely voluntary" and "completely anonymous" act. (J. Ex. 3.) Any employee who took a quiz form was expressly instructed that his answered quiz form had to be deposited in a designated box by no later than

[2] Miriam-Webster online dictionary - https://www.merriam-webster.com/dictionary/raffle.

noon on September 13. The quiz form deposit box was placed in the break room. Shortly after noon, the box of quiz forms was collected and the quizzes were graded after the September 15 polling period ended. The anonymous winners were announced, by quiz form number, on September 18 (the following Monday). (GC Ex. 2, ¶ 9.)

At the Hearing, General Counsel presented minimal testimony regarding the quiz contest.

- Counsel for General Counsel asked Travis Leonard if he recalled "a contest that took place" prior to the election. T. Leonard agreed there had been a "contest" (not a "raffle"), and that he had received a contest form from his supervisor. (Tr. 19.) T. Leonard never claimed that his supervisor sought him out to provide him a quiz copy – only that he had received one. That testimony is entirely consistent with the facts in the Joint Stipulation (paragraph 6.a.) which states an employee could "pick up" a quiz copy from a supervisor. (G.C.-2.)
- Rod Bush corrected Counsel for General Counsel's apparent misunderstanding that he had received a copy of the quiz form in the mail. He countered Counsel for General Counsel, explaining that he had only received a *reminder* about the voluntary quiz in his mail – not a quiz form. (Tr. 100-102.)
- Casey Nail, one of General Counsel's witnesses, testified that he was told his supervisor had quizzes available, but no one forced him to take one or sought him out to hand him one. (Tr. 84-85.)
- No other employee testified to the details of the quiz.

2. Respondent's Contest Communications Were Entirely Consistent with Long-Settled Board Standards Regarding Such Educational Options.

Regardless of the misclassification of the contest as a "raffle," and contrary to the allegations in the Complaint, Valmet's quiz contest was conducted in compliance with long-

standing precedent governing the use of such contests in the context of an organizing campaign. In *Atlantic Limousine, Inc.*, 331 NLRB 1025 (2000), the Board set forth the standard under which pre-election prizes might be deemed to violate the Act: "[I]f (1) eligibility to participate in the raffle or win prizes is in any way tied to voting in the election or being at the election site on election day or (2) the raffle [or contest] is conducted at any time during a period beginning 24 hours before the scheduled opening of the polls and ending with the closing of the polls."

Here, Respondent went to great lengths to ensure that participation in the quiz contest was not conditioned on voting in the election or related to a participant's presence at the election site. Indeed, participation could not have been so conditioned because the Company required that voluntary participants submit their quizzes more than twenty-four (24) hours prior to the scheduled election. (Jt. Ex. 3.) There was no connection whatsoever between eligibility for the two prizes offered – gained by submitting answers to the quiz prior to the election – and actually voting in or being present for the election. (GC Ex. 2; Jt. Exs. 1-4.)

Likewise, the Company did not take any actions concerning the quiz contest between 2:00 p.m. on September 13 (24 hours prior to the scheduled opening of the polls) and 7:00 a.m. on September 15 (the closing of the polls). (GC Ex. 2, ¶¶ 6(e), 8, 9.) The contest was announced two (2) weeks prior to the election, on August 30. (GC Ex. 2, ¶ 2, Jt. Ex. 1.) The quiz was available for pick-up and submission only from September 12 at 5:30am until noon on September 13. (Jt. Ex. 3.) Contest winners were not identified until after the election closed on September 15, and the prizes were not awarded until the regularly scheduled payday after the election. (GC Ex. 2, 5; Tr. 71.) This contest was therefore entirely permissible under the Board's bright line test in *Atlantic Limousine.*

3. Valmet's Prize Money Awarded to Two (2) Employees After the Completion of the Election Does Not Constitute an Unlawful Benefit.

Although the Union's initial Objections and Charge alleged unlawful polling and providing of a monetary award (GC Exs. 1(d),(e)), the Third Amended Charge and Complaint contained no such allegations.[3] (GC Exs. 1(m), (o).) Attempting to change course in the face of the undeniable fact that Valmet's contest was not impermissible under the Board's *Atlantic Limousine* test, the Union shifted gears to allege that the prizes constituted a *benefit* designed to unlawfully impact the outcome of the election under the standard set forth in *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991). (GC Exs. 1(m), (o).) The Company's quiz contest did not, however, implicate these concerns because it did not unlawfully influence the outcome of the election.

To determine whether granting a benefit would tend to unlawfully influence the outcome of the election, the Board examines a number of factors, including (1) the size of the benefit conferred in relation to the stated purpose for granting it; (2) the number of employees receiving it; (3) how employees reasonably would view the purpose of the benefit; and (4) the timing of the benefit. *Id.* at 245. Here, the Company offered only two cash prizes to be awarded to two employees, both based on the average dues that employees would have paid if the Union won the election and negotiated a contract; $900 represented a full year of dues, and the second prize of $450 represented a half year of Union dues, figures which were never challenged by the Union. (GC Ex. 2, ¶¶ 3, 4, Jt. Ex.1.) The $1,350 in total prize money is well within the value of prizes that the Board has found permissible in the context of a quiz contest since *Atlantic Limousine*. For

[3] Contests may also violate the Act if they are used by the Company to "identify employees who might or might not be sympathetic, and thus to learn where to direct additional pressure or campaign efforts." *Atlantic Limousine*, 331 NLRB at 1030, n.13. Regardless, the contest cannot form the basis for a charge of unlawful polling because the Company did not know – indeed, could not have known – the identity of the employees who submitted quizzes. (Tr. __; GC Ex. 2, Jt. Ex. 3.)

instance, the Board in *Washington Fruit* approved of the employer's raffle, in which it gave away goods valued at more than $2,250.00.[4] There, the Board held that the permissible prizes were designed to "focus the employees' attention on the issues which a representation election participant usually debates." *Washington Fruit*, 343 NLRB at 1273. The same approach is permissible here, with prizes of considerably less value, the Company used its contest to "make sure employees were aware of the facts which [it] sought to emphasize during the campaign." *Thrift Drug Co.*, 217 NLRB 1094, 1095 (1975).

In addition, unlike in *B & D Plastics* and other cases applying the standard for impermissible grant of benefits, the winning prizes were not awarded until after employees voted. (GC Ex. 1, ¶¶ 9, 11; Jt. Ex. 4.) The two employees did not receive any benefit until October 6, 2017, three weeks after they voted. (GC Ex. 1, ¶ 10.) In *B & D Plastics,* the benefits awarded certainly were not part of a lawful quiz contest; instead, the employer gave all employees two full paid days off and held a cook-out for them before voting took place. 302 NLRB at 245. The benefits found to have violated the Act under the *B&D Plastics* standard do not involve contests, but rather benefits that can have a long-lasting impact on employee's terms and conditions of employment. *See e.g., Bozzutos, Inc.*, 365 NLRB No. 146 (2017) (granting of unscheduled pay increase on same day employer learned of organizing activity).

For these reasons, General Counsel failed to prove that the Company's quiz contest was an impermissible raffle under the *Atlantic Limousine* test. It did not implicate coercion concerns that could violate the Act. The allegations in Paragraphs 7, 13(a), and 13(b) of the Complaint should therefore be dismissed.

[4] The election in *Washington Fruit* was held in January 1998. The current value of these goods is $3,466.77 according to the U.S. Bureau of Labor Statistics CPI Inflation Calculator. *See* https://www.bls.gov/data/inflation_calculator.htm.

C. General Counsel Failed To Prove That Tiffany Wallace Was Authorized To Act As Either A Supervisor Or An Agent Of Respondent; Further, General Counsel Failed To Prove That Wallace Made Unlawful Threats Regarding "Job Loss" or "Benefits Loss" (Responsive to Complaint Paragraphs 8(a) and (b)).

1. Wallace is Not a Supervisor of Valmet.

Even if allegations against her are credited, Wallace's comments cannot form the basis for a ULP finding against Valmet because she is neither a supervisor nor an agent of the Company. Her lack of status prohibits a finding that her statements can reasonably be construed as coercive.

As an initial matter, Wallace is not a Valmet employee, but is employed by Solution Group. (Tr. 145.) It is undisputed that Wallace does not have any involvement in hiring, evaluating, terminating, directing work, or other personnel related decisions. (R. Ex. 1; Tr. 146.) Wallace's role is essentially one of an on-site trainer who has been assigned to Valmet to assist in administering the safety program. (Tr. 145.) Wallace provides on-site monitoring of safety compliance and training on safe work practices used by Wallace at Valmet to ensure compliance with health and safety laws and regulations. Even the training modules are not her creations; but created by third-party entities. (Tr. 145, 159, 160.)

It is likewise undisputed that Wallace never had any authority to "hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline … other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action." 29 U.S.C. § 152(11). (Tr. 146.) In addition, Wallace's position does not require her to use independent judgment in performing her day-to-day duties. Such independent judgment is a further and necessary element to be considered a statutory Section 2(11) supervisor. Instead, Wallace is only expected to monitor established laws, policies and procedures to help to ensure a safe workplace. (Tr. 146.) Finally, the mere fact that her title contains the term "Manager" does not impact the analysis because supervisory status is not determined by job title. *Woodman's Food Mkt., Inc.*,

359 NLRB 1016, 1022 n.13 (2013). Moreover, not a single employee witness presented by the General Counsel (out of six (6)) testified that he considered Wallace to be a "supervisor".

The burden is on the General Counsel, as the party asserting supervisory status, to prove it. *Woodman's Food Mkt., Inc.*, 359 NLRB at 1024. Based on the evidence described above, the General Counsel cannot carry its burden to prove that Wallace is a supervisor or that her alleged statements can be imputed to Valmet. Her alleged statements, even if proved, cannot form the basis of an unfair labor practice against the Company. *See, e.g., Masterform Tool Co., Cylinder Components, Inc.*, 327 NLRB 1071, 1072 (1999) (holding that statements by non-supervisors cannot be attributed to the employer); *see also N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711 (2001) (noting that the General Counsel bears the burden of proving supervisory status).

2. Wallace is Not an Actual or Apparent Agent of Valmet.

Although it became clear that Wallace is not a supervisor under Section 2(11) of the Act, the General Counsel indicated – at the hearing – that her alleged comments to two employees should nonetheless be imputed to Valmet because she is an agent of the Company. (Tr. 124.) Contrary to such a claim, Wallace never functioned as an agent of Respondent under the theories of actual or apparent authority.

Actual authority on behalf of a party is "created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent takes action on the principal's behalf." *Adams & Assocs., Inc.*, 363 NLRB No. 193, n. 7 (May 17, 2016) (quoting Restatement (Third) of Agency, § 3.01). General Counsel presented no evidence to support the argument that Wallace had express authority to independently take any actions on behalf of Respondent. Wallace is a contract employee hired to handle very limited safety related duties, which are contained in her job description. (R. Ex. 1; Tr. 145-146.) The job description,

on its face, reflects nothing that could support a finding that she was either a supervisor or an agent. (R. Ex. 1.)

Consistent with the job description, Wallace has never been authorized to exercise independent business judgment on issues that might be considered binding on the Company. Also, it is undisputed that Wallace has no authority to take any binding personnel actions with regard to Valmet employees. She has no authority to discipline, move, or make decisions regarding personnel issues. Wallace also testified that she was never told – or given any impression – that she can act as an agent in the communications to the employees regarding the Union. (Tr. 148-49.) Clearly, she had no authority to act on behalf of Respondent, and was not an agent under the theory of actual authority.[5]

Ms. Wallace also cannot be considered to be an agent based on the apparent authority standard. The requisite apparent authority test is whether, under all the circumstances, Valmet employees "would reasonably believe that the alleged agent was reflecting company policy and speaking and acting for management." *Debar Electric*, 313 NLRB 1094, 1095; *Waterbed World*, 286 NLRB 425 (1987) (no apparent authority where there was no evidence "that at the time of the alleged unlawful statements (an interrogation and a threat of discharge) . . . that [Respondent] had held [the alleged agent] out as being privy to management decisions or as speaking with management's voice about these alleged unlawful matters or that employees perceived him as having such a role"). Obviously, Valmet did nothing to hold Wallace out as having any such authority with regard to communications prior to the NLRB election. There is no evidence that Valmet ever held Wallace out "as being privy to management decisions or as speaking with

[5] Wallace did not act on instruction from the Company, but in her own self-interest. Rumors that strong supporters of the Union wanted her out of the facility led her to seek out other Union supporters who she considered her "friends" to protect her job. (Tr. 153, 156-57.)

management's voice about … alleged unlawful matters or that employees perceived [her] as having such a role," *Id.* Wallace testified that she was not involved with any of the messaging regarding Valmet's position on the election issues. She did not attend any of the nineteen (19) employee meetings held during the time-period preceding the election. (Tr. 149.) She could not have been an agent under any reasonable interpretation of the apparent authority theory.

The single allegation against Wallace consisted of an alleged interaction with two employees prior to the election. Those two – Rod Bush and Michael Frierson – testified that Wallace approached them – looking for their coworker. Bush testified that when Wallace first walked up, she volunteered that she had been in a meeting "with the lawyer from the Company" and that a union election win would result in loss of "lead man" positions. (Tr. 97-98.) Wallace denied that she ever told the witness she was a meeting with a Company lawyer. (Tr. 154.) Frierson did not corroborate Bush's claim that Wallace had mentioned the meeting with the Company lawyer. (Tr. 109-114.) Frierson also noted that Wallace said "we were going to have a negotiated contract, like, we would have to go ahead and negotiate to get a better contract like them," (Tr. 111), which is consistent with Wallace's testimony that she discussed the fact that everything was negotiable. (Tr. 153.)

The only possible apparent authority argument that General Counsel can make stems from Bush's claim that Wallace allegedly told him and Frierson she was in a meeting with the Company's lawyer. (Tr. 97-98.) However, only Bush testified that she made such a statement. (Tr. 98.) No one else testified that she referenced a meeting with the Company lawyer and Wallace flatly denied making such statement. (Tr. 154.) She also denied she was ever in a meeting in which a Company lawyer or anyone else who told her that leadman positions or other benefits would be eliminated. (Tr. 154-55.)

Tellingly, neither General Counsel nor the Union asked any of the employee witnesses, including the two witnesses to whom Wallace allegedly made the threatening statement, whether they considered her to be an agent of the Company for any purposes. There is no evidence that any single employee ever considered her to be a member of management. The only employee testimony regarding her status came from T. Leonard, General Counsel's first and lead witness, when he volunteered that he "only taped managers" and that he did not consider Wallace to be a manager. (Tr. 30-32.)

Even if Wallace made the statement, it is insufficient to establish that these or any other employees would consider her to be an agent. As noted above, the critical issue in determining whether one has the apparent authority to act for the Company is "whether under all of the circumstances the employees would reasonably believe that [she] was reflecting company policy and speaking and acting for management." *Community Cash Stores*, 238 NLRB 265 (1978). For example, the employee at issue in *Community Cash Stores* had engaged in a litany of conduct that could have led the employees in that case to reasonably believe that he was acting as the Company's agent. *Id.* In addition, the Company had itself "condoned and ratified [the employee's] anti-union activities." In this case, the General Counsel relies on Wallace's attendance at one meeting and a single comment to show apparent agency status. This is far short of the General Counsel's burden. *See, e.g., Jules v. Lane, D.D.S., P.C.*, 262 NLRB 118, 122 (1982) (no apparent authority where alleged agent's duties in the normal course of business would not have included threats of discharge); *D.G. Real Estate, Inc.*, 312 NLRB 999 (1993) (real estate agent who was introduced by the company president to union picketers as the company's real estate agent, attended a union meeting with the company president, and who was present at the job site on a daily basis did not have apparent authority to deal with the union on behalf of the company);

Aljoma Lumber, Inc., 345 NLRB 261, 280 (2005) (independent contractor in charge of security did not have apparent authority to speak on behalf of company regarding union matters).

In light of the foregoing, there is simply no evidence to support any perception that Wallace was acting as an agent of the Company in its anti-union campaign. The allegations in Paragraphs 8(a) and 8(b) of the Complaint should be dismissed.

D. General Counsel Failed To Prove Respondent's General Manager, Brian Hammerbacher, Made Unlawful Threats In A September 7, 2017 Meeting With A Small Group Of Employees (Responsive to Paragraphs 9(a) and (b)).

1. Captive Audience Meetings.

In response to the organizing campaign, Valmet conducted three sets of captive audience meetings with employees split into groups split by department.[6] The Company conducted a total of nineteen (19) separate meetings with most employees attending three separate meetings. (Tr. 223.) The first set of meetings took place on August 30 and September 1, the second on September 6 and 7, and the third on September 12 and 13.[7] (Tr. 130-131.) The Complaint alleges and the General Counsel presented evidence that allegedly threatening comments were made in only two

[6] Only 2 of the 19 meetings are in issue in this case; one on September 7 and one on September 13. (GC Exs. 3.A & B.) General Counsel provided no evidence regarding any other captive audience meetings and, in fact, has made no allegations about comments made at any other meetings. To the extent that General Counsel would attempt to ask that the ALJ infer – from the limited comments on the tapes – that similar comments were repeated at all meetings, it is urged that such unwarranted inferences be rejected. At no point did General Counsel or the Union ask questions or raise claims that the alleged threats from the September 7 and 13 meetings were repeated in any other meetings. The General Counsel's failure to offer evidence of any alleged threats or other violations stemming from the other seventeen (17) meetings must be viewed objectively. It is a logical assumption that General Counsel spoke with employees who attended some – or all – of the other seventeen (17) meetings. If General Counsel had any inkling that alleged threats had been uttered in other meetings, it is inconceivable he would not have (at least) attempted to add such allegations to the Complaint.

[7] The second shift meeting always took place on the first date and the remaining shifts on the second day. (Tr. 223.)

(2) of the nineteen (19) meetings. The Complaint alleges that Hammerbacher made threatening comments in one of the September 7 meetings. (GC Ex. 1(0), ¶¶ 9(a), (b).)

At the outset, Respondent concedes that it is exclusively the trier of facts' role to make decisions concerning the relative credibility of witnesses appearing before him. Having accepted that premise, Respondent nevertheless believes it is appropriate to offer certain observations concerning credibility markers evident in the testimony of Mr. Travis Leonard.

T. Leonard testified that he first attended a meeting conducted by Brian Hammerbacher on September 1. That is undisputed. It is also undisputed that T. Leonard then went – that same day – to purchase the voice recorder he used to gather "evidence" of alleged unlawful statements. (Tr. 12-13.). If T. Leonard had simply testified that he purchased his voice recorder after the September 1 meeting for the purpose of making recordings of managers in meetings or conversations, such an admission would have been acceptable. It cannot be seriously denied that was his actual motivation. Instead, rather than admit the real reason for bringing a recorder onto Valmet's premises, T. Leonard opted to concoct a thin cover story for the purchase of his voice recorder. He claimed that, since he is a "diabetic", he has problems remembering things and needed a recorder to aid him with his recall. (Tr. 11.) He offered no corroborating proof that he is a diabetic or that he has had memory issues in the past. Moreover, T. Leonard admitted that – other than allowing his grandchildren to play with the recorder on one occasion before September 7 – he has never recorded any other non-work conversations or interactions. Not a single one. Obviously, if T. Leonard's' actual reason for the recorder purchase was solely his alleged memory issues, there is no logical reason why he has never used the device except for the two (2) meetings he recorded as putative "evidence" to present at the Hearing.

It is obvious that T. Leonard did not purchase the audio recorder for the reasons stated under oath. It is the Company's position that T. Leonard's decision, under oath, to fabricate his reason for purchasing the recorder should be evaluated when judging his overall credibility on the stand. While his testimony was extremely limited, the fact that he was dishonest on the record on the one issue should not be ignored. Where there are other instances when his testimony conflicts with that of another witness (manager, supervisor or coworker), T. Leonard's credibility should be accorded less weight.

Only one other General Counsel witness offered any testimony regarding the alleged unlawful statements made during the captive audience meetings. Scotty Lawrence testified only about what and when he heard Doug Sheaffer use certain words during the September 13 meeting. Other than that, General Counsel relies solely upon the statements he highlighted from the two (2) recordings admitted into evidence. (GC Exs. 3A, 3B.) At the Hearing, General Counsel did not specifically identify those statements made in the two (2) meetings. As stated, Travis Leonard made the two recordings and the General Counsel submitted the recordings into evidence without comment or explanation. (GC Exs. 3-A and 3-B.) As reviewed further, *infra*, there is no dispute as to the words used by the two speakers or by others in the two (2) meetings in issue. It is only whether the words used – those snippets of conversations in the context of meeting give-and-take – actually constitute unlawful threats.

2. Hammerbacher Did Not Threaten Employees With Frozen Wages or Loss of Pay Increases.

Although the General Counsel did not identify the specific comments alleged to violate the Act, there are only two excerpts from the September 7 meeting that remotely connect to Complaint allegations that Hammerbacher threatened employees with "frozen wages" and "loss of benefits." (GC Ex. 1, ¶¶ 9(a)(b).) At approximately the 7:04 mark on the Hammerbacher recording, he says:

> Also, in the event the union is voted in, everything we have today is going to be placed in what's called status quo. Have you heard that term before? That means that everything is really frozen because everything is subject to negotiations. You can't be changing the game in the middle during negotiations so everything stays as it is in regards to policies, procedures, the compensation. So during that period of time there is no increase – merit increase related to this and step-progression as well. Everything is frozen until negotiations go on.

(GC Ex. 3A at 7:04.) Importantly, earlier in that same meeting Hammerbacher makes the following comments to explain how the contract negotiations process works and what can happen to pay and benefits during negotiations: "In the event that a contract or a union is voted in, we will talk about how these policies and such would play into it since everything is negotiable and everything is on the table." (GC Ex. 3A at 5:54.)

Hammerbacher testified, without rebuttal, that he had a good reason for addressing the issue of what happens to pay and benefits during negotiations. Specifically, he received direct questions about pay and the issue of "frozen" wages from employee Scott Whitehead prior to the September 7 meeting. (Tr. 127.) As he testified, Hammerbacher's intent was not to threaten employees; he was attempting to provide information regarding the somewhat confusing subject of what "status quo" means with regard to pay and benefits during negotiations. (Tr. 127.)

These communications merely reflect Hammerbacher's attempt to answer employees' questions regarding the status of their wages and benefits during negotiations. Considered in context, they do not violate Section 8(a)(1) of the Act and do not warrant overturning the results of the election. These statements are not threats of loss of benefits, but when considered in context constitute statements of what lawfully could happen during the give and take of bargaining with the Union. *See, e.g., Montrose-Agesum Co.*, 306 NLRB 377 (1992) (statement in employer's literature that "while bargaining goes on, wages and benefit programs typically remain frozen until

changed, if at all, by contract" held not unlawful); *Oxford Pickles*, 190 NLRB 109 (1971) (accurate statements of law and facts did not amount to implied threats).

Here, the alleged statements involved a realistic and legal communication to the employees regarding the status of wages and benefits during negotiations. Specifically, Hammerbacher, delivered a legal message to employees – the Company is not allowed to make unilateral discretionary changes to pay or benefits during negotiations and the "status quo" must remain in place. This is legally accurate. Given the uncertainty and easily confusing nature of wage increases while negotiating a contract with a union, and the fact that the employees were uncertain whether the progression raises would be considered "discretionary," the Company took the approach of stating the legal standard regarding the maintenance of the status quo during negotiations.[8]

In addition, Hammerbacher's use of the term "frozen," with respect to wages, does not alone qualify the statement as a threat. The Board directly addressed this issue in *Flexsteel Industries*, 311 NLRB 257 (1993). In *Flexsteel*, the Board reversed the ALJ's findings based on a misclassification of the employer's statements. The ALJ had relied upon an inaccurate version of the employer's statements that "present benefits would be lost" and "[n]egotiations often go on for many months while your wages and benefits would be frozen by law (the Company could not unilaterally agree to give a wage increase) while negotiations continue." *Id.* at 257. The employer's literature actually read "present benefits could be lost" and "the company could not unilaterally give a wage increase." *Id.*

Applying these standards here, *Flexsteel* stands for the proposition that an accurate

[8] In fact, both Respondent and General Counsel witnesses alike testified that they were not certain how the step-progression wage increases would be impacted by the potential obligation to bargain with the union. (Tr. 93, 94, 175-76.)

statement of the law to employees during the campaign period does not violate the Act. Here, Hammerbacher did not threaten employees, but in response to an employee question accurately stated that during negotiations, the employer is not permitted to make unilateral changes to discretionary terms and conditions of employment – the status quo must remain. Accordingly, the allegations in Paragraph 9(b) of the Complaint should be dismissed.

3. Hammerbacher Legally Compared the Columbus Employee's Severance Benefits With the Severance Benefits of its Union Employees.

The other allegation, that Hammerbacher threatened employees with loss of benefits, was based on how he addressed Valmet's severance plans. In an attempt to explain to employees that they currently enjoy a better severance plan benefit than USW represented employees do at the Valmet Neenah, Wisconsin operation, he used the phrase "non-union plan." (GC Ex. 3.) While reading the actual severance plan language, Mr. Hammerbacher noted that "the severance plan is a nonunion facility plan only." (GC Ex. 3-A at 27:27.) He then went on to clarify that, with respect to the severance plan and everything else, all would be negotiated: "it's all being negotiated if it isn't in the contract then it's that long list of policies and procedures of the company that apply … it could better from a policy standpoint, it could be worse, you don't know." (GC Ex. 3-A at 32:20.)

Lori Kohl, who was present in that and all meetings, also explained the differences between the Valmet Columbus plan and the negotiated plan at the USW-represented plant in Wisconsin: "The contract has severance language in it but it only pertains if the location were to close. We had the closure of the Appleton [Wisconsin] location manufacturing facility so they had language regarding closure of the plant … so Neenah [Wisconsin] as one of the contract negotiations put in plant closings separate but not for layoffs." (GC Ex. 3-A at 33:44.) Hammerbacher offered employees the opportunity to ask questions on all these issues. (GC Ex. 3-A at 35:28.)

A copy of the severance plan was used as a visual aid during the September 7 meeting and Hammerbacher read part of it to the employees. (Tr. 226; GC Ex. 3-A.) That severance plan is governed by the Earned Retirement Income Security Act ("ERISA") and contains eligibility criteria that specifically excludes union represented employees: "To be eligible for the benefits provided under this Plan, you must be classified by the Employer as a non-executive employee of the Employer in the United States who is not represented by a labor union." (R. Ex. 2, p. 3.) (Emphasis added.) The plan's express exclusions of union represented employees are repeated: "The following individuals are not eligible to participate under the Plan: … any individual who is represented by a labor union; …" (R Ex. 2, p. 3.) The fact that an ERISA document was presented and explained does not constitute a threat.

Hammerbacher legally informed employees of the difference between the severance benefits that they receive compared to Valmet's union-represented employees and did not unlawfully threaten employees with loss of severance benefits. During an organizing campaign, an employer may lawfully compare union and nonunion benefits and make statements of historical fact. *See, e.g.*, *Suburban Journals of Greater St. Louis, LLC*, 343 NLRB 157, 159 (2004) (noting that "[a]n employer is permitted to compare its represented employees' wages and benefits with those of its unrepresented employees . . . . [and] to state its opinion, based on such a comparison, that employees would be better off without a union"). In fact, the Board has consistently approved of factual comparisons of historical wages and benefits in the midst of representation campaigns. For example, in *RHCG Safety Corp*, 365 NLRB No. 88 (June 7, 2017), the Board approved of a Vice President of Operations' statement that "there were many members of Local 79 who were not working whereas his employees were working." *Id.* Rather than an impermissible threat, the Board adopted the ALJ's finding that the statement was a protected "comparison between the work

opportunities available to members of [the Union] in the industry at large as compared to the amount of work that the [Company] has made available to its own employees." *Id.* *See also TCI Cablevision of Washington, Inc*., 329 NLRB 700, 701 (1999) (holding that the employer did not make an unlawful promise of benefit where it offered a comparison of 401(k) benefits, which were more beneficial at its non-unionized locations); *Viacom Cablevision*, 267 NLRB 1141, 1141-42 (1983) (approving of employer's comparison of "wages enjoyed by other employees in other [Company] systems and . . . statements of historical fact concerning the yearly increases which had been given elsewhere in the past").

Furthermore, Hammerbacher's reference to the plan as a "non-union plan" cannot be reasonably construed as a threat that employees would lose the benefit since it was factually correct. Simply referring to the plan as "non-union" does not constitute a threat, especially in the context of comparing it to severance benefits negotiated on behalf of other employees. The specific reference to the fact that the Company provided some form of benefit to its other employees eliminated the possibility that the employees could reasonably construe this accurate semantic reference to their current plan as "non-union" as a threat. *See, e.g., Big G Supermarket, Inc., d/b/a Town and Country Family Center*, 219 NLRB 1098 (1975) ("[I]t cannot reasonably be held that Respondent was required to conceal innocent facts from the employees simply because the facts (namely the existence of insurance coverage) might lessen their ardor for unionization.").

Indeed, the Board has specifically permitted Companies to notify employees regarding the facts surrounding existing benefits, noting that "prohibiting an employer from publicizing existing benefits merely because the employees had not previously been made aware of such benefits would deprive the employer of a legitimate campaign strategy necessary to counter the union's claim that it offers better benefits." *Scotts IGA Foodliner*, 223 NLRB 394 fn. 1 (1976). *See also, John W.*

Galbreath & Co., 266 NLRB 96, 96 (1983) (employer permitted to "stress to employees those benefits they have received without a union's assistance, and contrast wages and working conditions in his plant with those in unionized plants"); *Clark Equipment Co.*, 278 NLRB 498, 499-500 (1986) (no violation where employer truthfully informed employees that past benefit packages to the non-unionized plant employees were better than those at the employer's unionized plants); *Sheraton Plaza La Reina Hotel*, 269 NLRB 716, 717-718 (1984) (truthful statement corroborating report that union's contracts in the area did not provide the sick leave benefits currently enjoyed by the non-unionized employees). Because this comparison and factually correct reference to the current severance plan as "non-union" cannot be construed as a threat in violation of 8(a)(1),

Here, Hammerbacher simply noted during the meeting that Valmet had negotiated severance benefits with the USW in Neenah, but that those benefits did not include benefits were limited to plant closure. Hammerbacher's comparison of severance benefits was not a threat that the Company would not negotiate in good faith regarding benefits – it was a statement of then-existing fact that the Company's severance package currently offered to Columbus employees was more beneficial than the Union represented employees in Neenah. This is consistent with the Company's point – that it was not threatening to take away benefits or to refuse to bargain for benefits, but that current benefit levels could be better than what the employees could negotiate through the union. *See e.g., Dayton Hudson Corp.*, 316 NLRB 85, 95-96 (1995) (employer did not violate 8(a)(1) by telling employees that (1) pension and supplemental plans would be negotiable if union got in, and (2) workers in another unit represented by another labor organization did not have supplemental plan). Rather than threaten employees that it would unilaterally withdraw severance benefits, or that it would refuse to bargain in good faith with the Union

concerning the severance plan, Valmet merely stressed what benefits employees currently receive without any Union assistance. The allegations in Paragraph 9(a) of the Complaint should be dismissed.

E. General Counsel Failed To Prove That Respondent's Vice President Of Human Resources, Doug Sheaffer, Made Unlawful Threats, Unlawful Promises Or Statements That It Would Be Futile To Select The Union As Bargaining Representative (Responsive to Complaint Paragraphs 11(a), (b) and (c)).

The Complaint alleges that Sheaffer made threatening and other unlawful statements in one of the September 13 meetings. (GC Ex. 1(o), ¶¶ 11(a), (b) & (c).) The General Counsel has failed to prove by credible evidence that Sheaffer engaged in any threats, restraint or coercion within the meaning of Section 8(a)(1) of the Act. While relying solely on the recording of Sheaffer's speech to a small group of employees, the General Counsel has presented no testimony putting Sheaffer's remarks in any specific context and there is no evidence that anything Sheaffer said during the meetings had any coercive impact on any of the voters. Keeping in mind that Section 8(c) of the Act specifically permits an employer to truthfully advise employees about the collective-bargaining process, about the benefits they currently receive, and about the fact that such matters become subject to negotiation in the event that the Union is certified, context is of vital importance here. Sheaffer's comments were made in the direct context of discussing exactly these facts, including the fact that negotiations can result in better conditions, worse conditions, or the same conditions or any other variable that bargaining may reach, all of which are permitted pursuant to Section 8(c).

1. Sheaffer Did Not Make Unlawful Threats of Frozen Wages or Lost Raises.

Although Sheaffer briefly touched on the topic of wages during his planned remarks on September 13 (GC Ex. 3B), he never used the term "freeze" or "frozen" until point-blank questions

were asked by an audience member. He never threatened employees with retaliatory action if they voted in favor of union representation. He simply tried to describe the negotiations process:

> When you negotiate the first contract, everything is up for negotiation. We don't just pick up this book and say we are going to follow this book and save one they have in Neenah. We come with our proposals, the union has their proposals. We go back and forth. It could take a couple months it could take up to a year. During that time, we can't do anything. We can't give any wage increases, we can't change anything, you got to kind of wait until the contract is negotiated.

(GC Ex. 3B at 38:45.)

The only references to wages being "frozen" during the meeting came after Sheaffer asked for questions. (Tr. 79, 137; GC Ex. 3-B at 38:50.) At the 38:50 mark of the recording employee Scotty Lawrence asked questions. The following exchange occurred between Lawrence and Sheaffer:

> **Lawrence:** If it goes in and *you said it "freezes"* everything even though you are in a progression stage *it freezes* your grades and all is what you're saying. Why is that? Even though you are study at a certain point?[9]
> **Sheaffer:** Because once the union is elected or certified as your official bargaining agent, we can't give any benefits or wage improvements without their say-so they may not want to have progression everything is up for negotiation. They may say we do not like progression, they may say we don't like paying for performance. They may want to do away with some of those things. We have to honor and go with what is agreed upon in negotiations.
>
> **Lawrence:** That is where I want to ask why is it *frozen* there I just don't understand why it would stop like you said if it was *frozen* and we are still getting progression. As long as it was, I always come here three months and I guess, I'm trying to get, even though were waiting on the contract be settled will go back then we'll go back to.

[9] Lawrence's baseless claim that Sheaffer had already said "it freezes everything" is entirely false. Sheaffer never made any such a statement or used the words "freeze" or "frozen" in his prepared remarks – prior to the question and answer portion of the meeting. (Tr. 139, 140; GC Ex. 3B.) A review of General Counsel's own exhibit squarely rebuts Lawrence's false accusation and testimony. (Tr. 79; GC Ex. 3B.) Lawrence also falsely testified that Sheaffer used the term "frozen" in response to his question. (Tr. 80.) That never happened. In total, Lawrence initiated use of the words "frozen" and "freeze" four (4) distinct times during his brief questioning of Sheaffer. (GC Ex. 3B at 38:50.) Lawrence then lied to make it look like Sheaffer had used those words.

Sheaffer: Well we're settling the contract.

Lawrence: I guess.

(GC Ex. 3B at 38:50.) At approximately the 43:34 mark of the recording, Sheaffer discussed step-progression wages in response to a similar question from the audience:

> Q: You have mentioned differential and leadman pay is subjected to contract negotiations. Does that go with shift differentials to?
> A: I mean everything is up for negotiation is the law the National Labor Relations Act says that we have to bargain over wages, hours, and terms and conditions of employment. So anything with wage rates, what they are, how they are determined, do you have progressions, do you have everybody gets the same raise or is it based on performance; plant seniority; and how you know people if they have recall rates; layoffs and cutbacks; those are all things you have to negotiate over. We do not have to agree to them but you have to negotiate with them.

(GC Ex. 3B at 43:34.)

The topic of wage increases came up once more during Sheaffer's presentation, also in response to a question from the audience. While discussing benefits, and what can happen to medical benefits when employees go out on an economic strike, the following exchange occurred:

> Q: When this is in negotiations you still have your medical?
> A: We can't change what is called … the status quo. So the benefits that are in effect today would basically stay. If the company decided every year we have to do reenrollment and premiums change as to what companies charge us, all of that would stay in place, but stuff like wage increases we would have to freeze. We could not change any employment practices. If we had to have a layoff, we could not come up with a new way of doing it. We would have to do it the way we have always done it type of thing.

(GC Ex. 3B at 48:53.) This is the <u>only</u> time Sheaffer used the terms "freeze" or "frozen," which is understandable given that the employees repeatedly used these terms in their questions.

Not a single employee testified that they felt threatened by the statements or that any of the statements had any impact on their vote. To the contrary, hourly employee Casey Nail testified that he was not sure if the progression wages would also be in the "status quo" during negotiations

if the employees selected union representation. (Tr. 94.) Scotty Lawrence, who asked Cliett whether progression wages would be frozen if the union was voted in, stated in his Board affidavit that he knew, even before he asked Sheaffer or Cliett the question, that progression raises would not be "frozen" because he had asked the union about it. (Tr. 81.)

Under the same standards set forth in the legal argument related to Hammerbacher's comments, the mere use of the term "frozen," does not make the statements threatening, especially when considered in the totality of the circumstances and Sheaffer's overall presentation. Even more compelling here is that Sheaffer did not use the term except in response to employee questions in which they used the term. The multiple times during which employees used the term "frozen" when asking questions about step-progression raises, combined with Lawrence's testimony that he already knew the answer to the question when he asked it support a reasonable inference that employees were baiting Valmet managers into making "threatening" comments as a means to overturning the election if the results did not go their way. This inference is further supported by the fact that not a single employee testified that they did not believe that they would get their step-progression raises if the union won the election.

In this instance, Sheaffer's comments informed the employees of the realities of the collective bargaining process, i.e., that employees can get more, less, or the same as a result. These statements simply do not violate the Act. *Chef's Pantry, Inc.*, 247 NLRB at 77, 83 (adopting ALJ's conclusion that employer did not violate the Act by stating that there were no guarantees that "wages, benefits, and working conditions remained the same when a union was voted in and were then negotiated upward," and showing a blank sheet of paper, stating "that bargaining starts with a blank sheet of paper, and everything has to be negotiated from that point"); *Telex Commc'ns*, 294 NLRB 1136, 1140 (1989) (employer lawfully told employees that bargaining involved give

and take, that they would not necessarily receive higher wages and benefits, and that they might "win, lose, or draw" as result of bargaining; statements did not constitute threat to reduce wages if employees selected union as their bargaining representative). *See also, S. Bakeries, LLC v. N.L.R.B.*, 871 F.3d 811, 821 (8th Cir. 2017) (holding that employer did not engage in unlawful threat of reprisal or promise of benefit by telling employees that the "union could only make promises but could not guarantee that they would come true," "that the union would only win what the company was voluntarily willing to give," and that "a union is powerless in guaranteeing changes."). The allegations in Paragraph 11(a) should be dismissed.

2. Sheaffer Did Not Threaten Futility in Bargaining.

Again, General Counsel identified no specific comments to support the allegation that Sheaffer threatened employees with futility in bargaining. A review of the entire recording reveals no comments whatsoever that would constitute threats of futility in bargaining. (GC Ex. 3B.) Since we are forced to guess as to what the Complaint's "futility" claim might be, we could only identify one section of the tape that addresses bargaining realities. Certainly, General Counsel never questioned Sheaffer about any statements that would encompass a "futility" claim.

During a discussion regarding the relative generosity of employees' current benefits, Sheaffer responded:

> If you look around communities you'll probably find that our benefits are far superior to other employees. I think if you look around the community you will also find that our pay is much better than most of the other jobs in the community. Very rarely do we have people that leave this company to go to better paying jobs or jobs with better benefits. When you think about reasons on why people think a union would be good to have at this facility, the first thing you jump to and say is would they be able to improve the wages and benefits. *I think that is highly unlikely, because you guys are already in the top tier*.

(GC Ex. 3B at 11:13.) During the same discussion, Sheaffer pointed out that the 401(k) benefits offered to the employees in Columbus was better than that of the unionized employees in Neenah:

> And guess what, my benefits are better than the union has. It means they do not offer matching the 401(k) plan. None of the union facilities have matches on their 401(k). Some comments on some of the [union] handouts have been made that says it is up to management of this plan to agree or disagree with the contract is up to corporate lawyers. Period. Well that's not true."

(GC Ex. 3B at 13:37.) To explain that response, Sheaffer stated:

> The union contracts are negotiated by Lori and myself and basically the process we go through the negotiated contracts we have a little legend, a little matrix, and we have all the plants, we know all the plants and we have the wage rates, we have the increases in essentially you try to keep everybody the same. Treat everybody in North America the same. Somebody is telling you that there is this big expectation out there that if you get a union you're going to get a 10% increase your pay or benefits, *yes everything is subject to negotiation* I can't make any promises, but I can tell you that today the facts are I just do not see how that happened and look at the contracts, you can look at what I have, you kind of look at what the past increases and they are essentially the same as what you've been getting here at the plant *so people are telling you there is this big windfall out there to be had I really don't see how that's possible.*

(GC Ex. 3B at 15:00.) During the process of summarizing how negotiations work, Sheaffer commented:

> First negotiations could take months, everything is on the table. You're not guaranteed that you are going to have what you have today. *Could be better, could be worse, could be the same, could be a little different.* Everything is subject to negotiation on both sides of the table. So, there is no guarantee.

(GC Ex. 3B at 30:07.)

Generally, it is unlawful for an employer to send a message to employees that selection of a union would be an "exercise in futility." *See Overnite Transp. Co.*, 296 NLRB 669, 671, 132 LRRM 1176, 1178 (1989), *enforced,* 938 F.2d 815, 138 LRRM 2018 (7th Cir. 1991). Nonetheless, conveyance of a sense of futility sufficient to warrant setting aside an election ordinarily requires that the employer stated "either expressly, or by clear implication, that it would not bargain in good faith with a union even if it were selected by the employees." *See American Greetings Corp.*, 146 NLRB 1440, 1445 n.4, 56 LRRM 1064 (1964). Here, there is no express nor implied implication

that Valmet, Inc. would not bargain in good faith with the union. In fact, Sheaffer went out of his way to mention the fact that Valmet would bargain in good faith with the Union if the employees voted in favor of Union representation. (GC Ex. 3B. at 36:00.)

Accurate statements of the law that voting for a union does not automatically guarantee an increase in wages and benefits do not threaten futility, since the employer does not have to agree to any union bargaining demand, and the employer has as much right to ask for wage and benefit reductions as the union has to ask for increases. *See General Elec. Co.*, 332 NLRB 919, 165 LRRM 1335, 1337 (2000); *Fern Terrace Lodge of Bowling Green*, 297 NLRB 8, 132 LRRM 1294, 1295 (1989). "[A]n employer is free to communicate to his employees any of his general views about unionism or any of his views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *General Electric Co.*, 332 NLRB 919, 165 LRRM 1335 (2000). Even in the context of coercive statements about the futility of bargaining, statements that employees lose direct access to management upon becoming unionized are usually lawful. *See Hyatt Hotels Corp. dba Hyatt Regency Memphis*, 296 NLRB 259, 259 n.3, 132 LRRM 1130 (1989). *See also Milford Plains Ltd. P'ship*, 309 NLRB 942, 143 LRRM 1080 (1992) (remark not sufficient to show futility); *Pepsi-Cola Co.*, 307 NLRB 1378, 141 LRRM 1037, 1038 (1992).

For example, in *General Elec. Co.*, on remand from the D.C. Circuit, the Board held that the language in the employer handbill, stating the extremely divergent positions prior to bargaining, was lawful and served an objective basis for additional statements indicating the potential for "long bitter negotiations" and "a long and ugly strike." 332 NLRB 919, 165 LRRM 1335, 1337 (2000). The Board found that the employer "was not telling its employees that union representation would be futile. Rather, the Respondent's explanation was consistent with how the

Act operates in practice. If parties are sharply divided ..., negotiations can indeed, become protracted and bitter." *Id.*

Like in *General Elec.*, Sheaffer was not telling the employees that unionization would be futile. In fact, unlike *General Elec.*, Sheaffer did not go as far as to suggest the duration or conditions of negotiations and possible strike. Surely, if the Board held that the language in *General Elec.* was lawful, the language used by Sheaffer, too, is lawful. Throughout the September 13 meeting, Sheaffer was simply trying to explain how the negotiations process works and possible risks associated with collective bargaining. Applying the standards set forth above, these comments do not violate the Act and the allegations in Paragraph 11(c) should be dismissed.

3. Sheaffer Did Not Unlawfully Solicit Grievances.

Grievance solicitation during a pre-election period is not a per se violation of section 8(a)(1). *NLRB v. Arrow Molded Plastics, Inc.*, 633 F.2d 280, 283, 107 LRRM 3332 (6th Cir. 1981); *Idaho Falls Consol. Hospitals, Inc. v. NLRB*, 731 F.2d 1384, 1386, 116 LRRM 2390 (9th Cir. 1984). As the Board itself held in *Uarco, Inc.*, 216 NLRB 1, 88 LRRM 1103 (1974);

> However, it is not the solicitation of grievances itself that is coercive and violative of Section 8(a)(1), but the promise to correct grievances or a concurrent interrogation or polling about union sympathies that is unlawful; the solicitation of grievances merely raises an inference that the employer is making such a promise, which inference is rebuttable by the employer.

Id. at 1-2. *See also, Airport 2000 Concessions*, 346 NLRB 958, 960 (2006) (no unlawful solicitation of grievances where supervisor made no promise to remedy any issues raised by employees, and did not in fact remedy any of the problems employees raised); *Wal-Mart Stores, Inc.*, 340 NLRB 637, 640 (2003) (noting "well-established" Board precedent "that it is not the solicitation of grievances itself that violates the Act, but rather the employer's explicit or implicit promise to remedy the solicited grievances that impresses upon employees the notion that union representation is unnecessary). The question therefore is whether Valmet rebutted any inference

of promises, assuming that the employees might have been led to make such an inference from what seems to have been relatively isolated and innocuous comments by Sheaffer.

Nothing included on the September 13 meeting tape can be construed as solicitation of grievances and/or promises to employees. The only comments that by any stretch could be construed as a solicitation of grievances occurred towards the end of Sheaffer's comments when he said the following:

> Yeah, we have some internal problems. We don't always get along, but let's be men. Let's put the fish on the table as they say in Finland. *If you have a problem, put it out there let's talk about it and let's resolve it and let's agree*. If we're not going to agree we are going to go on with our ways.

(GC Ex. 3B at 55:49.) These statements do not even meet the definition of "solicitation" to start with, much less the type of solicitation that could imply a promise to remedy the grievances such that union representation is unnecessary. *See Williams Enterprises,* 301 NLRB 167 (1991) (finding no violation when supervisor referred to union as "fence between us," and said employee could "come to him" with problems since remarks did not constitute solicitation of grievances); *Columbian Rope Co.,* 299 NLRB 1198 (1990) (finding no violation when supervisor told employee he was available if employee wanted to talk since statement does not constitute solicitation of grievances); *Craft Maid Kitchens,* 284 NLRB 1042 (1987) (finding employer's president's telling employees not to be misled and to direct any questions to him did not constitute solicitation of grievances); *Butler Shoes,* 263 NLRB 1031 (1982) (reminding employees of "open-door" policy did not constitute solicitation of grievances because employer announced no new policy and did not imply that its response to grievances would change); *Burns Int'l Security Servs.,* 216 NLRB 11 (1975) (request for questions or comments at meeting did not constitute solicitation calculated to induce employees to forsake the Union).

The Board has found solicitation to be an unfair labor practice when an employer not only solicits grievances, but accompany them with promises and actions that would indicate to employees a change of company policy as a substitution for union representation. *Compare, Center Constr. Co.*, 345 NLRB 729 (2005) (although employer had a prior policy of allowing employees to present grievances to their immediate supervisor, employer's direction to individual employee to bring his grievances to the employer's president was a significant change in policy and constituted an unlawful solicitation of grievances) and *House of Raeford Farms*, 308 NLRB 568 (1992) (unlawful solicitation of grievances found where employer implemented program to solicit grievances prior to beginning of union organizing activity but significantly altered its method of grievance solicitation after union organizing campaign began), with *Longview Fibre Paper & Packaging, Inc.*, 356 NLRB 796 (2011) (no unlawful solicitation where employer implemented a change to workplace schedules as a result of a brainstorming meeting consistent with past practice); *TNT Logistics N. Am., Inc.*, 345 NLRB 290 (2005) (no violation during ongoing union organizing campaign where employer had past practice of soliciting grievances through an "open door" policy). Typical Board cases finding unlawful solicitations involve conduct along the lines of changing the way employers receive and address complaints. *See e.g. Center Constr. Co.*, 345 NLRB 729 (2005) (employer's direction to individual employee to bring his grievances to the employer's president was a significant change in prior policy and constituted an unlawful solicitation of grievances).

Here, there is no evidence that Valmet expressly conditioned any employee benefits upon withdrawal from union activity or votes against the Union. Indeed, Sheaffer was very careful to state that no promises could be made. (GC Ex. 3.B at 15:00.)

Tellingly, the General Counsel relies solely on the statements made by Sheaffer during the September 13 meeting. General Counsel did not proffer a single employee witness to testify that they considered these statements to be threats that the Company or that Sheaffer intended to redress any grievances in exchange for votes against representation.

Sheaffer's comments constitute a legally permissible statement regarding the realities of collective bargaining and his opinion that sometimes, in his own experience, unionization had the effect of making communications between management and employees more cumbersome. This does not constitute an unlawful solicitation with an implied or express promise. Accordingly, the allegations in Paragraph 11 (b) should be dismissed.

F. General Counsel Failed To Prove That Respondent's Shipping and Receiving Supervisor, Chris Cliett, Directed Threats To "Employees" That "Wages" Would Be "Frozen" and "Raises Lost" If They Selected The Union (Responsive to Complaint Paragraph 10).

During the week of the election, but before Sheaffer's presentations, Shipping and Receiving Supervisor Chris Cliett had a single interaction with an employee regarding what may happen to employees' wages when a union wins an election. (Tr. 74, 77). Specifically, employee Casey Nail overheard employee Scotty Lawrence ask Cliett about "progression step wages and if they would be 'frozen' if the Union was selected as bargaining representative." (Tr. 86-87.) Cliett specifically testified that the interchange started with a direct question from Lawrence. (Tr. 86.) Even though Lawrence admitted that he had previously been advised by a union representative that certain ("progression step") raises should continue to be paid if employees voted in favor of the Union, he still chose to ask Cliett questions on the same issue. (Tr. 81).

Lawrence testified first and claimed that he and Nail were together in an office, when Cliett suddenly "stuck his head in the window" and blurted out that – if the Union was to win the election – employees "would not get progression" raises. (Tr. 75.) According *only* to Lawrence, Cliett then

closed the office window and continued walking. (Tr. 76.) In his NLRB affidavit, Lawrence had asserted that the conversation had actually started with a question from Nail regarding his own progression step raise issues (Tr. 81.) Nail denied that claim and, at the Hearing, on his part, Lawrence changed his testimony from his NLRB affidavit to say that Nail did not participate in the conversation with Cliett at all. (Tr. 75-76.) At the Hearing, Lawrence volunteered that he heard Cliett use the word "froze" during the exchange. (Tr. 75.) Cliett testified that he does not believe he ever used the word "froze" – as Lawrence claims – during their brief conversation or at any other time. (Tr. 75.) Mr. Nail's testimony fully corroborates Cliett's recall that he did not use the word "froze," nor did Cliett say that employees "would not get progression raises." As in the testimonial contest between Lawrence and Sheaffer on the same issue, the stark differences between Lawrence's version of the progression raise conversation and both Nail's and Cliett's recalls, suggests that his credibility as a witness must be questioned.

Both Nail and Cliett recall the brief interchange with Lawrence entirely differently than Lawrence claims. Both testified that it was Lawrence who asked Cliett a leading question on the issue of wages and raises in a post-election setting. (Tr. 86; 167.) Cliett said that Lawrence asked him what would happen to progression raises if the Union won the election. (Tr. 168.) Cliett testified that he never raised the issue of raises – of any kind – in conversations with Lawrence or anyone else. (Tr. 167-168; 171.) Nail testified that it was Lawrence who asked Cliett – during a pre-shift meeting – if progression raises would be "stuck in <u>status quo</u>" if the Union won the election. (Tr. 86.) Nail also confirmed – referring to an affidavit provided to the NLRB – that he was entirely consistent in his recall that it was Lawrence who first raised the topic of progression raises to Cliett. (Tr. 87; 89.) In fact, according to Nail, Lawrence became persistent in asking about the issue of progression raises, and it became clear that Lawrence was "not happy" with

Cliett's attempts to respond. (Tr. 90.) Specifically, Lawrence was unable to goad Cliett into replying that raises – "progression" or other – would be "frozen" if the Union won the election. (Tr. 90-91.) As Nail recalled Cliett's response, the supervisor only replied that everything would "have to be negotiated and in status quo" during bargaining. (Tr. 90.)

Cliett testified that he tried to respond to Lawrence's questions as best as he could. He also testified that he has never been involved with contract negotiations between an employer and a union and does not have a thorough understanding of the topic. (Tr. 176.) He testified that his limited knowledge on the status quo concept is derived only from what he learned in an educational meeting. (Tr. 170.) As he testified, it was his understanding – at the time of Lawrence's question – that all current pay, benefits and working conditions must be held in status quo after a union wins an election. He also testified that it was his understanding nothing could be changed or taken away from employees during bargaining. (Tr. 175-176.)

Certainly, it is not difficult to understand Cliett's lack of understanding on the legal fine points incorporated into Lawrence's questions. Moreover, Cliett's default answer – that everything must stay in status quo until changed through agreement between the parties – is technically correct. *See, Txu Elec. Co.*, 343 NLRB 1404, 1405 (2004).[10] Additionally, even

[10] This case concerns a situation in which the status quo of a mandatory bargaining subject at the commencement of a bargaining relationship includes an annual review of wages to determine whether an increase will be given and, if so, the amount. That is, the established wage rates are not fixed for an indefinite period of time. Instead, the employer has a past practice of annually reviewing and adjusting those rates according to certain criteria. Obviously, it may continue to do so unilaterally with respect to its nonunit employees. The question before us is what must the employer do to honor its new bargaining obligation for unit employees. Unlike a fixed term and condition of employment, *the unit employees' wage rates are scheduled for review and change on a certain date even if the parties have not reached overall agreement or impasse in bargaining by that date.*

In its analysis, the Board stressed that the employer did not violate the Act because its actions occurred "in the context of a new-collective-bargaining relationship." (*Id*. at 1407.) The Board added:

Counsel for the Union appeared to understand that there are differences between the types of "raises" that employees may receive from an employer, and that such differences may directly impact how they are affected by the status quo doctrine. Union Counsel noted that there are clear differences between so-called "cost of living increases" and other raises that may be based on an employer's discretionary practices to provide specific increases based on performance or other criteria. (Tr. 176.)

At the Valmet-Columbus operation, some employees have been provided with both annual and "progression" raises. Although neither the NLRB nor the Union attempted to clarify – at the Valmet operation – how "annual" increases may differ from progression raises, it is undisputed that Lawrence's questions to Cliett (and Schaeffer) only touched on the "progression" raise model. As described by all witnesses, Valmet's "progression" step raises are directly associated with specific job titles/skill tracks. (Tr. 172-174.) Employees are expected to progress in specific job tracks. They are evaluated – within each track – at set points in time to determine if their skills and exhibited performance are sufficient to achieve the next "progression step". (Tr. 168.) In the early stages of a track, employees are evaluated every three (3) months; as they continue in the track, the evaluations become less frequent – every six (6) months. (Tr. 173-174.)

It is undisputed that such "progression step" increases are not "automatic" or guaranteed. (Tr. 175.) Indeed, even Lawrence agreed that "progression step" raises are "up to the supervisor" who reviews an employee's performance and other factors to determine if a "step" raise is

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> We agree with the opinion in *Daily News of Los Angeles*, 315 NLRB at 1244, that where, as here, a discrete recurring event occurs every year at a given time, and negotiations for a first contract will be ongoing at that time, an employer can announce in advance that its plans to make changes as to that event. . . . As long as the union is given notice and opportunity to bargain to those matters. The employer can carry out the changes even where there is no overall impasse as of the time of the change.

deserved. (Tr. 82.) Lawrence confirmed that "you have to meet certain performance criteria" to be awarded each "step" raise. (Tr. 82-83.) Cliett described the process of how Valmet determines if – and how much – an employee will receive as a progression step raise. He testified that such increases are not automatic, and that he had personally denied some progression step raises to "several" employees over the years. (Tr. 168-16; 173-174.) When asked by General Counsel if all "existing benefits" would "stay the same" during negotiations, Cliett answered that it was his understanding they do. (Tr. 175.) Cliett described the evaluation process, stating that an employee has to "meet all the standards" at a step to be awarded an increase; he further listed the several elements of a review that establishes the standard for receiving a "progression step" raise. (Tr. 173-174; 177-178.) No evidence was presented to counter the fact that progression raises are not automatically given at every step.

General Counsel, through a single witness, attempted to prove that Cliett directly threatened Lawrence when – as Lawrence claimed – his supervisor replied to his "set-up" question by saying that "progression" raises would be "froze" if the Union was to win the election. Clearly, General Counsel failed to provide any creditable evidence that Cliett ever used the word "froze". In fact, the only witness to Lawrence's questioning attempt – Casey Nail – directly refuted Lawrence's claim that Cliett ever used the word "froze". Nail's testimony also specifically rebuts Lawrence's self-serving claim that Cliett walked up, made a blunt remark about wages being "froze" – and walked away. It never happened.

As a fallback position, General Counsel appeared to argue with Cliett that the phrase status quo, as used by Cliett in his attempted response to Lawrence, could constitute a violation of the Act if an employee might infer that all future raises would be "stuck" in time due to application of status quo. (Tr. 174-176.) But that is not what Cliett said. His reply to Lawrence's direct question

according to Nail was only "if I'm not mistaken"… "they have to be negotiated and are in status quo". (Tr. 90.)

Based on that response, a more logical interpretation of Cliett's limited use of the phrase status quo is that everything currently in place when a union wins an election stays that way until the parties agree to change it. If, for example, there are annual pay increases that are not discretionary and so regular as to be expected – as to amount and timing – those would actually be part of the status quo. *See, Txu Elec Co.*, 343 NLRB at 1405. However, raises that are not scheduled at the same times and in amounts that will vary at the discretion of the employer cannot – by definition – be part of the status quo at the time of an election. Here, the progression raises were entirely discretionary, according to witnesses Cliett, Nail, Lawrence and others.

General Counsel cannot assume that Cliett's honest attempt to answer Lawrence's very strategic questions constituted a violation based on what some unknown employee might infer. Lawrence testified – without rebuttal – that he never discussed the event with others. (Tr. 170-171.) It is also very important to note that Lawrence never even testified that he personally perceived Cliett's alleged answer as a threat. Moreover, Nail directly testified that he did not understand Cliett's description on the post-election status quo nature of pay and benefits to mean that "progression" raises would be impacted – one way or another. (Tr. 94.)

In general, communications to employees regarding the status of their wages and benefits during negotiations do not violate Section 8(a)(1) of the Act. Such statements are not threats of loss of benefits, but rather constitute statements of what lawfully could happen during the give and take of bargaining with the Union. In fact, there are times when an employee has attempted to explain how negotiations work, using the word "frozen"; but still not found guilty of an 8(a)(1). *See, e.g., Montrose-Agesum Co.*, 306 NLRB 377 (1992) (statement in employer's literature that

"while bargaining goes on, wages and benefit programs typically remain frozen until changed, if at all, by contract" held not unlawful); *Oxford Pickles,* 190 NLRB 109 (1971) (accurate statements of law and facts did not amount to implied threats).

Here, Cliett's alleged response, even if proven, involved a realistic and lawful communication regarding what can happen to wages and benefits during negotiations. As previously discussed, Hammerbacher, Sheaffer and Cliett all delivered the same legally-based responses to employee questions that employers are not allowed to make unilateral, discretionary changes to pay or benefits while negotiations are ongoing. This is a legally-accurate statement. Given the confusing nature of how to explain the NLRA's standards on what can happen with wage increases while negotiating a contract, especially where discretionary are involved, Cliett's answer regarding his understanding of status quo is neither negotiable nor a threat. The allegations contained in Paragraph 10 of the Complaint should be dismissed.

G. General Counsel Failed to Prove That Respondent's Plant Manager, Larry Richardson, Unlawfully Threatened Justin Leonard With "Termination" or "Unspecified Reprisals" (Responsive to Complaint Paragraphs 12(a) and (b)).

This was a somewhat unusual post-election ULP Hearing in that there were no alleged discriminatory discharges or discipline, no allegations that the Company threatened to close/move the plant and none of the more typical claims that the Company threatened to never negotiate with the union. The closest that General Counsel could come to including an allegation akin to a "hallmark" claim is the one involving Justin Leonard and Larry Richardson.

General Counsel's very transparent motive with regard to J. Leonard's allegations against Richardson appears to have been to paint a dark picture of a manager who made a direct threat to "fire" J. Leonard on the first day of the election. Unfortunately for J. Leonard, all of the testimony of the three other witnesses reveals an entirely different version of what actually transpired between J. Leonard and Richardson on September 14, 2017. In fact, J. Leonard admitted – on the

stand – that his supervisor never said he would fire him or made any threats against his job or tenure. All that J. Leonard could muster was his unsupported and unwarranted perception that he was threatened. As seen herein, no reasonable person could interpret his supervisor's comments on September 14 to mean what J. Leonard wants others to believe they meant.

Moreover, J. Leonard told such a wildly different story than other witnesses that, like his father's decision to embellish on facts in his testimony, this witness' credibility should be given less weight when compared with that of those who directly disputed him. As the testimony reveals, this is not a simple "he said –vs.– she said" credibility contest. J. Leonard's testimony is in direct conflict with the relevant and important aspects of what witnesses Richardson, Ken Hopper and Lori Kohl all had to say. This situation is, therefore, more actively a "he-said –vs.– she/he and he said" one.

There are some places where J. Leonard and Richardson were in agreement about their September 14 conversation. Both agreed they have worked together for many years. Both agreed that Richardson was involved in J. Leonard's original hiring. Both agreed that the September 14 conversation took only five (5) to ten (10) minutes. (Tr. 51.) Both agreed that Richardson never raised his voice, used curse words or got in J. Leonard's face.

Richardson testified that he returned from lunch at around 12:30 or 12:45 on September 14, as he always did. (Tr. 183.) He testified that is when he saw Leonard, by himself, at a test machine he walked to where he stood. (Tr. 183.) J. Leonard did not recall the exact time when Richardson approached him; but no effort was made to rebut Richardson's recall of the timeline.

Both men agreed the conversation started casually. Both testified that Richardson asked J. Leonard about a specific roll repair issue that had occurred over a month earlier. (Tr. 45, 56-57, 187.) Both agreed that Richardson asked J. Leonard if he had spoken to G.M. Hammerbacher

about the earlier roll repair issue. (Tr. 187.) J. Leonard did not deny that he had complained to Richardson's boss about the roll repair issue. (Tr. 44.)

Richardson testified that, not long before his September 14 conversation with J. Leonard, G.M. Hammerbacher had informed him that a complaint had been made about shipping a roll back to a customer before testing had been completed. (Tr. 185.) Richardson testified that Hammerbacher told him J. Leonard and another employee had complained and he asked Richardson if the roll was going to be a "problem." (Tr. 183.) Richardson explained that he was not aware of any complaint by J. Leonard and assured him that the roll was properly repaired.

At the Hearing, J. Leonard described his interaction with Hammerbacher differently. Instead of just admitting that he had gone to the G.M. to complain about his boss' decision-making on the earlier roll repair issue, J. Leonard added that he also told Hammerbacher "Larry's the reason the union is here," and complained that Richardson tries to "run" everything. (Tr. 45.) However, no one else, including Richardson, ever heard that claim before the Hearing. (Tr. 186-187.)

Richardson testified that the complaint that had been made to Hammerbacher had been on his mind and – when he saw J. Leonard by himself on September 14 – he decided to go and discuss the issue with him. (Tr. 187.) Both men testified that Richardson did most of the talking. According to Richardson, he wanted J. Leonard to understand the "decision-making process" on if/when rolls are ready to be shipped. (Tr. 187.) Richardson also testified that he "thinks a lot of Justin" and explained that "we're a team" and "we're all in this together" in his efforts to help J. Leonard understand why the earlier roll shipment was not improper. (Tr. 188.)

Richardson also recalled that he "bragged on" J. Leonard and repeatedly told him he was "proud" of what he had accomplished. He admitted he had said "I hired you," as he was explaining

why he was "proud" of how he had progressed. (Tr. 188-189.) However, Richardson also testified – without rebuttal – that he had made similar comments to J. Leonard in the past. (Tr. 189-190.)

Both witnesses testified that there was also a lot of "small talk" during their several minutes' interaction. (Tr. 45-46.) In fact, J. Leonard specifically recalled that there was casual conversation for a while after Richardson made the alleged "I hired you" comment. (Tr. 58.) Richardson testified – without rebuttal – that J. Leonard did not appear angry or upset during their encounter. (Tr. 189-190.) Richardson estimated that the conversation was over by 1:00 p.m. (Tr. 191.)

At the Hearing, J. Leonard also alleged that Richardson had told him, "If the union gets in here, we won't be able to talk like this." (Tr. 45.) Richardson testified he never said that and there was no mention of the union or the election at all. (Tr. 190.)

To his credit, J. Leonard did not attempt to embellish on his story as to Richardson's "hired you" comment. He expressly testified that Richardson did tell him "I hired you", but never actually said the phrase "fire you" or made any other such specific threatening statements. (Tr. 55-56.) At the Hearing, J. Leonard tried to argue that he <u>heard</u> a threat: "If you read between the lines," he heard Richardson say "… I hired you … and I can fire you." (Tr. 60.) J. Leonard also dramatically added that he understood Richardson's comments to mean "If I vote yes – he's going to fire me." (Tr. 59-60.) Clearly, nothing in Richardson's comments, or the tone of the interaction (as described by J. Leonard), can serve to justify such obviously self-serving perceptions of a threat. J. Leonard agreed, on cross exam, that Richardson never said he would "fire" him. (Tr. 60.)

Moreover, J. Leonard's own words and demeanor after the conversation with Richardson clearly undercut his credibility as to his outsized perception of an alleged threat on September 14. At some point after he and Richardson ended their conversation, J. Leonard went to see his

immediate supervisor – Ken Hopper. According to Hopper, J. Leonard did not come into the office area they shared until 2:00 p.m., or shortly thereafter. (Tr. 202.) At the very least, Hopper's unrefuted testimony raises the question of where J. Leonard was between 1:00 and 2:00 pm.

Hopper testified that J. Leonard appeared upset, but not angry. (Tr. 202.) He also recalled that J. Leonard appeared to be most concerned that the conversation he had with Hammerbacher about a past roll repair issue had been reported to Richardson. During his initial comments to Hopper, he exclaimed "ain't but two people" who knew about his complaint to Hammerbacher. (Tr. 60.) Such a comment is entirely consistent with J. Leonard's questioning of Richardson as to who had told him about the complaint that was made. (Tr. 45.)

During his testimony, J. Leonard made several blunt claims about what happened when he went to the office to see Hopper.

- He stated that Ken was "pretty pissed" when he told him about Richardson's comments to him. (Tr. 46.)
- He also claimed that Ken "got made and stormed off." (Tr. 46.)
- He specifically stated that Hopper left the office to find H.R. Manager Kohl. (Tr. 47.)
- He claimed that he went "straight" to Hopper's office after the conversation with Richardson, even though it appears Richardson left J. Leonard's area at 1:00 pm – but J. Leonard did not arrive at Hopper's office until 2:00 pm. (Tr. 46; 202.)

Hopper testified that none of J. Leonard's claims are true.

- He was upset about having to deal with a conflict late in the day – but did not "get mad or storm off." (Tr. 201-202.)

- He was not "pissed" at Richardson for a making a threat to "fire" J. Leonard – because he never heard that. (Tr. 206.)
- He called Ms. Kohl on his cell phone – while in the office in front of J. Leonard. (Tr. 204; 206.)

Ms. Kohl arrived at the office about five (5) minutes later. (Tr. 208; 228.) According to J. Leonard, he told her, "if you want to fire me – go ahead." (Tr. 47.) J. Leonard never explained why he would make such a statement to Kohl. Kohl testified that J. Leonard never said any such thing. (Tr. 228-229.) Hooper corroborated Kohl's testimony on this point. (Tr. 208.) Importantly, J. Leonard testified that Kohl responded that they were not going to fire him. (Tr. 47.)

Both Kohl and Hopper agreed that J. Leonard never said anything – at all – about Richardson's threatening to "fire" him. (Tr. 229.) Kohl testified that it was her impression J. Leonard appeared to be "upset" about the fact that someone had told Richardson about J. Leonard's complaint regarding the questionable roll repair, nothing else. (Tr. 229-230.) She said he did not appear "angry." (Tr. 229.) In fact, Kohl recalled that when she asked J. Leonard if he felt threatened by Richardson's conversation, he only replied "I don't want to get Larry to lose his job." (Tr. 230.)

Both Kohl and Hopper agreed that J. Leonard never said anything about the union in their meeting. (Tr. 230.) Contrary to J. Leonard's testimony, Kohl never said there was "nothing she could do" regarding J. Leonard's concern. (Tr. 231.) She told J. Leonard that Valmet would "address" the issue. (Tr. 230.) When they were finished, Kohl informed him that the election time was close. He left at that point. (Tr. 230.)

In an effort to create the appearance of a nexus between Richardson and J. Leondard's brief conversation with J. Leonard and the NCRS election, Hopper was questioned regarding when he

first heard rumors from other employees about the interaction. He testified that he did not hear anything until after 4:00 on September 14 – as he was leaving for the day. (Tr. 218.) By that point, the polls were closed. Since J. Leonard testified that he went directly from meeting with Kohl and Hopper to vote, his testimony was that he never spoke with anyone before he cast his own ballot. (Tr. 55.) No evidence was offered to allege any knowledge by Friday's meeting voters of the J. Leondard-Richardson interaction. Surprisingly, neither General Counsel nor Counsel for the Union asked J. Leonard if Richardson's alleged threat had influenced his voting choice.

J. Leonard did not testify that Richardson directly threatened him he would be fired if he voted for the Union. That is undisputed. The General Counsel would instead ask the ALJ to credit J. Leonard's manufactured inference that Richardson threatened him by saying "remember that I hired you" and by allegedly saying that "if the Union come in, we wouldn't be able to have conversations like this anymore." Neither claim should be credited. Moreover, even if Richardson made both statements, neither can be considered as direct threats. First, statements that employees may lose direct access to management upon becoming unionized are lawful. *Overnite Transp. Co.*, 296 NLRB 669 (1989). Second, Richardson credibly testified that he made the statement that he had hired J. Leonard "in the context that we are all in this together. It's not a – there was nothing threatening about it – It was just part of we feel like we're a team." (Tr. 188.)

General Counsel has not met its burden to prove that Richardson made unlawful threats to J. Leonard on September 14 and Paragraphs 12(a) and 12(b) of the complaint should be dismissed.

IV. CONCLUSION

The ALJ should find, based on the overwhelming record evidence, that Valmet did not violate the Act as alleged in the complaint. The General Counsel's witnesses were not credible. They did not have strong recollections and could not tell a consistent story. Respondent's witnesses, on the other hand, were forthright and offered corroborative testimony that was logical.

Finally, most of the alleged conduct testified to by the General Counsel's witnesses is not unlawful under Board precedent.

Respectfully submitted,

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Dated this 10th day of April, 2016

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25

VALMET, INC.	)	
	)	
and	)	CASE NO. 15-CA-206655
	)	CASE NO. 15-RC-204708
UNITED STEEL PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED-INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	)	

CERTIFICATE OF SERVICE

The undersigned hereby certifies that Respondent Valmet, Inc.'s Post-Hearing Brief in the above case has been served on the following by electronic mail:

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Dated this 10th day of April, 2018.